STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

March 22, 1996

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Re: CC Docket No. 95-185

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed postage pre-paid envelope.

Yours truly,

Mary Mack Adu

Mary Mack Adu
Attorney for California

MMA:nas

Enclosures

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	CC Docket No. 95-185
Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers.	CC Docket No. 94-54

REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

The People of the State of California and the Public Utilities Commission of the State of California ("CPUC") hereby submit these reply comments in the above-referenced docket.

I. INTRODUCTION AND SUMMARY

The comments on this NPRM cover a wide range of positions with respect to bill and keep compensation arrangements, and the Commission's jurisdiction to mandate such arrangements under the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") and the Telecommunications Act of 1996 ("Act of 1996").[1] On the issue of which framework the Federal Communications Commission

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1. Budget Act, Pub.L.No. 103-66, 107 Stat.312 (1993); Act of 1996, Pub.L.No.104-104, 110 Stat.56 (1996).

("Commission") should adopt for its federal interconnection policy framework, comments run the gamut from the voluntary model to the mandatory approach. Some parties believe that there is no need for an interim NPRM because the Act of 1996 moots the issue. Others believe that this proceeding should be incorporated into the broader interconnection proceeding mandated by the Act of 1996.

The issue of whether the Commission has the authority to mandate bill and keep compensation for LEC-CMRS interconnection was a very contentious topic, and an issue on which parties tended to take strong positions for and against. Parties opposing mandated bill and keep include: Ameritech, GTE Service Corporation, NYNEX, Pacific Bell, Pacific Bell Mobile Services and Nevada Bell ("Pacific"), Bell Atlantic, Ohio State Commission, Connecticut Department of Public Utility Control (CDPUC), and the National Exchange Carrier Association, Inc. (NECA). Arguing for federally mandated bill and keep compensation were such parties as AirTouch Communications (AirTouch), MCI Telecommunications (MCI), Sprint, Cox Enterprises, Inc. (Cox), Omnipoint Corporation (Omnipoint), American Personal Communications (APC) and America's Carriers Telecommunication Association (ACTA). Many parties supported negotiated interconnection agreements and noted their inclusion in the Act of 1996.

Consistent with its comments previously filed with the FCC,[2] and in accordance with the Budget Act and the Act of 1996, the California Public Utilities Commission ("CPUC") continues to support the dual regulation of commercial mobile radio service (CMRS) providers, believing, as do the New York Department of Public Service (NYDPS) and others, that a collaborative federal-state approach is not only preferable to federal preemption, but also that there is no basis in law for the Commission to usurp state authority over LEC-CMRS interconnection. The CPUC also agrees with those parties which commented that the Commission should adopt the voluntary model because we believe that it is most compatible with the Act of 1996.

In sum, the CPUC believes that the Act of 1996 provides no support for federal preemption of state regulation of interconnection between LECs and CMRS providers. States should be allowed flexibility to fashion compensation arrangements that best suit their individual needs within a larger national framework, so long as universal service, open competition and nondiscriminatory access are the hallmarks. The CPUC's program is fully consistent with congressional intent as set forth in the

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2. Comments of the People of the State of California and the Public Utilities Commission of the State of California, CC Docket 95-185, dated March 1, 1996. The CPUC would like to clarify a misstatement on page 11 of its opening comments regarding the Pacific Bell-MFS interconnection agreement. The agreement's toll termination charge of 1.4 cents per minute is based on Pacific's intrastate switched access rates, not the local call termination rate of 0.75 cents per minute.

Budget Act, the Act of 1996, Commission policy and precedent, and the public interest and should be allowed to continue.

II. DISCUSSION

A. California Believes LEC-CMRS Interconnection Should Not Be Addressed In Isolation From the Consideration of General LEC-Competitor Interconnection.

California believes that LEC-CMRS interconnection issues should not be addressed in isolation. Rather, consistent with NPRM ¶¶76-81 and New York's comments on page 12, we agree that a long term approach, applicable to all competitors, is preferable. For this reason, California's local competition rules do not exclude wireless carriers.[3] While California does not believe there is a need to immediately alter LEC-CMRS interconnection arrangements, California recognizes the need for a revision of these policies. As California indicated in its opening comments, the CPUC is in the process of reviewing its policy toward LEC-CMRS interconnection in the context of its local competition proceeding. By the end of 1996, the Commission will consider its long term LEC-CLC interconnection arrangements policy and how CMRS should be treated. California did not comment on the variety of interim or long-term interconnection compensation

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3. As of yet, Cox Enterprises has not requested to compete in California as a Competitive Local Carrier. The problems discussed by Cox Enterprises (Comments at 16) have not been addressed in California's local competition proceeding.

options mentioned in the NPRM because of the CPUC's active consideration many of these same issues.[4]

B. The New York Department of Public Service (NYDPS) Correctly Concludes that the Commission's Proposed Interconnection Rules May Result in Unequal Treatment of Some Technologies in the Emerging Local Telecommunications Market.

NYDPS argues that mandating bill and keep could hinder New York's efforts to create a level playing field between wireline and wireless local competitors, since it has recently adopted a reciprocal compensation arrangement for terminating calls.[5] New York reasons that, if the Commission's proposed rules go into effect, CMRS providers that do not have to pay for terminating traffic will benefit over new wireline entrants that do have to pay for terminating traffic. This will violate the principle of technological neutrality.

Although the Commission has proposed an interim policy for LEC-CMRS interconnection compensation that is consistent with

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4. While the CPUC cannot make any recommendations on a particular long-term interconnection arrangement at this time, California can suggest that the Commission should not feel excessively constrained by the potential impact of call termination pricing policies on cellular rates. AirTouch argues that retail rates and interconnection rates are so tightly linked that consideration of many of the reciprocal compensation options should be precluded because of their impact on rates. AirTouch Comments at 24. In California, there is no discernible relationship between retail cellular rates and interconnection rates. For example, Cellular One in San Francisco offers a calling plan with unlimited free night and weekend calling even though it must pay a flat per minute interconnection charge.

5. NYDPS Comments at 4.

California's interim policy for LEC-CLC interconnection, a similar disparity could emerge in the long term. If, at the end of their respective interim periods, the Commission adopts a reciprocal compensation system for LEC-CMRS interconnection while the CPUC maintains a bill and keep arrangement for LEC-Competitive Local Carrier (CLC) interconnection, then technological neutrality would be violated. The only way to prevent discriminatory treatment in the long run would be to have the Commission and states develop policies cooperatively.

C. The Voluntary Model Is Most Compatible with the Act of 1996 and Should be Adopted by the Commission.

It is the CPUC's position that the voluntary, informal model for implementing federal interconnection policies within a coordinated national framework is the option most compatible with the Act of 1996 and the Budget Act that predates it. We therefore agree with those parties that endorse this model.[6] The Act of 1996 establishes a national framework that promotes universal service, nondiscriminatory access, and open competition. Within that framework, states are given the opportunity to continue using state regulations that advance

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6. A sampling of this group consists of Pacific Bell, the Public Utilities Commission of Ohio (PUCO), the Connecticut Department of Public Utility Control (CDPUC), and NYDPS.

these goals, but do not conflict with federal policies.[7] This model most clearly mirrors the framework envisioned by the Act of 1996, and the CPUC urges the Commission to adopt it.

Since the informal model complies with the Act of 1996 and is the optimum approach allowing for a coordinated effort of achieving an open nationwide telecommunications network, the Commission should consider incorporating it into the interconnection NPRM rather than abruptly terminating this proceeding. The CPUC concurs with such parties as Bell Atlantic, NYDPS, and the National Exchange Carrier Association (NECA) which advocate incorporating this proceeding into the broader interconnection proceeding mandated by the Act of 1996. This approach ensures technical neutrality, and is the efficient thing to do. It avoids duplication of effort, and preserves limited state and federal resources in grappling with issues that will affect the entire nation.

D. **Jurisdiction**

1. **None of the Commenters Established Clear Commission Authority to Preempt State Authority Over LEC-CMRS Interconnection.**

Parties argued on both sides of the preemption issue. NYNEX believes there is no basis in policy or in law to preempt state

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7. For example, states can impose regulations to promote universal service, protect public safety, ensure service quality, and safeguard consumer rights, so long as one company is not favored over another and none of the regulations prohibit or have the effect of prohibiting competition in telecommunications services (Act of 1996, §253(b)).

commissions in order to mandate bill and keep compensation (NYNEX, pp. 1,3-5). Ameritech concurs that the Commission lacks jurisdiction to order uniform LEC-CMRS interconnection arrangements because such arrangements are the intended province of state authorities under the 1996 Act (pp. 11-12). GTE Service Corporation also weighs in to oppose any Commission mandate of LEC interconnection arrangements because they should be determined by agreement, per the 1996 Act (pp. 6-10). Pacific Bell opposes the Commission's interim proposal for "bill and keep" and believes that the Telecommunications Act of 1996 has mooted the NPRM proceeding.[8]

Bell Atlantic opines that the Commission's proposal to mandate bill and keep interconnection compensation arrangements between LECs and CMRS providers is contrary to the 1996 Act, pointing to Section 251 which gives states the jurisdiction to review and approve all interconnection agreements negotiated under that provision (pp. 3-6). The Ohio state commission agrees that there is no legal basis to conclude that state jurisdiction over CMRS interconnection has been preempted by Congress, and that the 1996 Act reserves substantial authority over the approval of interconnection agreements for state commissions (Ohio's Comments, pp. 10-11)

The CPUC agrees with the above parties that state authority over LEC-CMRS interconnection remains intact under the Act of

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8. Comments by Pacific Bell, Pacific Bell Mobile Services, and Nevada Bell, pp. 1-5.

1996, and disagrees with those parties that endorse federal preemption of state authority over LEC-CMRS interconnection terms and conditions.[9] In the final analysis, "[t]he critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." Louisiana PSC, 476 U.S. 355 at 369 (1986). No federal legislation passed to date evidences Congressional intent to preempt state authority over intrastate LEC-CMRS interconnection rates. Indeed, the opposite is true. Section 152(b) of the Communications Act of 1934 established state jurisdiction over intrastate wire communication. By its terms, this provision fences off intrastate matters from the Commission's reach. The Supreme Court agreed that Section 151, defining the role of the Commission, and 152(b) "are naturally reconciled...to enact a *dual* regulatory system...." Id. at 370 (emphasis in original).

The Budget Act does not disturb joint federal-state regulation of communication by wire or radio. The Commission correctly concluded that Section 332 does not circumscribe state regulation of interconnection rates that local exchange carriers (LECs) charge CMRS providers. NPRM, ¶112. As we stated in our

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9. Interexchange carriers such as MCI Telecommunications (MCI), Sprint, and America's Carriers Telecommunication Association (ACTA) favor preemption and a mandatory approach to compensation. Also in agreement with that approach are Personal Communications Service (PCS) providers such as Cox Enterprises, Inc. (Cox), Omnipoint Corporation (Omnipoint), and Americal Personal Communications (APC). Western Wireless Services Co., Inc. (Western) and Nextel Communications, Inc. (Nextel), providers of SMR and paging services, believe that the Commission has the authority and should preempt state regulation of interconnection rates.

comments, "[b]y the terms of Section 332, Congress intended to preempt only state regulation of the 'rates charged by' mobile service providers, consistent with Congress' concern that rates charged by CMRS providers to the end users should not be subject to state regulation unless necessary to ensure just, reasonable and nondiscriminatory prices to end users...." CPUC Comments, p. 17. Included in Section 332 is Congress' express exception that states would not be prohibited from regulating the other terms and conditions of commercial mobile service. Following the clear mandate of Congress, the Commission correctly declined to preempt state authority over intrastate LEC-to-CMRS interconnection rates. *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 at ¶¶228, 231.

2. State Regulation of LEC-CMRS Interconnection Rates Does Not Negate Federal Interconnection Policy.

The Supreme Court in Louisiana PSC placed limits on a state's authority over intrastate communications only when the state's exercise of that authority negates the Commission's exercise of its own lawful authority over interstate communication.[10] No facts in the NPRM or in the parties' comments demonstrate that the states' regulation of intrastate rates for LEC-to-CMRS provider interconnection negates the Commission's regulations. Moreover, the 1996 Act, by

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10. 476 U.S. at 375-76, n. 4.

reinforcing important roles for states to play in determining the terms and conditions of interconnection, codifies the collaborative federal-state approach to regulation and implicitly recognizes that the states' regulation of interconnection rates does not negate federal policy or interest.

The Act of 1996, specifically Section 251 and 252, makes clear that states have a defined and required role in approving negotiated interconnection agreements, or in mediating or arbitrating upon request. Section 252(e)(5) preempts the state's authority only if the state fails to act. Because the Act of 1996 does not affect LEC-CMRS interconnection,[11] state authority over the terms and conditions of CMRS providers remains intact. Thus, there is no basis in law or policy for federal preemption.

3. **The Inseverability Exception in Louisiana PSC Does Not Apply.**

Some parties, such as Arch Communications Group, Inc. (Arch), AirTouch and AT&T Wireless, justify federal preemption on the ground that intrastate and interstate components of CMRS calls are inseverable. The CPUC rejects this argument. As the CPUC noted in its comments, "California agrees with the Commission's prior statement that the costs associated with the provision of interconnection for interstate and intrastate

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11. Section 253(e) provides: "Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers."

cellular services are segregable." California's Comments, p. 24. Pacific Bell demonstrates with particularity in its comments that intrastate and interstate calls are indeed severable. Both LECs and CMRS can determine the point of origination and termination of a call. Pacific also explains that the point of entry of CMRS, such as the CMRS MTSO or the LEC's switch, is known and could be used as a reliable surrogate for the actual location of the call.[12]

Moreover, the D.C. Circuit Court of Appeals has firmly rejected the "broad position that whenever facilities are physically inseparable, the Commission may preempt state regulation."[13] Inseverability alone is not sufficient to justify federal preemption. The overriding issue, as previously discussed, is whether state's exercise of its authority negates the Commission's exercise of its lawful authority to regulate interstate communication. The CPUC believes that the Commission's authority is not rendered nugatory in the face of state regulation of LEC-CMRS interconnection, and therefore preemption is not warranted.

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12. Pacific Comments, pp. 102-103.

13. National Ass'n of Reg. Utility Com'rs v. FCC, 880 F.2d 422 at 428 (D.C.Cir. 1989).

4. AirTouch's Interpretation of Section 401 As A Basis for Preemption Has No Foundation.

AirTouch believes that preemption is warranted, and that bill and keep is the optimal interconnection pricing policy for the off peak period. It further advocates the application of bill and keep policies equally to all broadband CMRS providers. AirTouch claims that Section 401 of the 1996 Act "has vested the Commission with ultimate authority over matters relating solely to intrastate interconnection." (AirTouch Comments, pp. 52-53) The CPUC takes issue with this interpretation. Section 401 simply requires the Commission to forbear from applying any provision of the Act if the regulation is not necessary to ensure just, reasonable, and nondiscriminatory rates, if the regulation is not needed to protect consumers, and if forbearance is in the public interest.[14] A state must forbear if the Commission forbears from applying a provision of the Act.

After reciting the requirements of Section 401, AirTouch concludes that "[t]he Commission is thus empowered to preempt entirely any state authority given to those states pursuant to Section 252 if circumstances warrant." (Comments, p. 53) This reasoning represents a leap in logic and, more importantly, it is contrary to the Joint Conference Report which states that "[t]his

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14. However, the Commission may not forbear from applying Section 251(c) (interconnection duties of incumbent LECs) or Section 271 (BOC entry into interLATA services) until after those sections have been fully implemented (§401(d)).

new subsection is not intended to limit or preempt State enforcement of State statutes or regulations." (Joint Conference Report, p. 185)

E. Pacific Bell's Interpretation of the Telecommunication Act of 1996's Provisions on Bill and Keep are Excessively Restrictive.

Pacific Bell incorrectly argues that the Act, "allows Bill and Keep only by agreement of the parties to 'waive their rights to mutual recovery.'"[15] Pacific Bell refers to Section 252(d)(2)(B)(i) which does not indicate that interconnection agreements must result from an agreement of parties. First, while Section 252 strongly encourages negotiation of interconnection agreements, it also recognizes that these negotiations may fail and that states may be called on to intervene through arbitration. In its capacity as arbitrator, a state may determine that bill and keep is an equitable interconnection arrangement. Second, Section 252 (d)(2) addresses pricing guidelines for the Commission and the states' implementation of Section 251 (b)(5) which is independent of the negotiation mechanism established by the Act. Finally, the idea that mutual recovery is a "right" strengthens Pacific's argument, but is not found in the text of the Act. Pacific's contention that "no regulator can mandate bill and keep" is simply not supported by the Act.[16]

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15. Pacific Bell Comments at 24, 94.

16. Pacific Comments at 94.

III. **CONCLUSION**

For the reasons stated herein and in the CPUC's earlier comments, the CPUC urges the Commission to honor the mutual compensation principle required by the Act of 1996, but not to mandate any specific compensation arrangement for LEC-CMRS interconnection. States should have the opportunity to tailor specific arrangements to suit their own individual needs so long as state programs are consistent with the federal policy promoting mutual compensation, competition and nondiscriminatory access. This approach recognizes that state and federal governments are indispensable to the regulation of communication by wire and radio. California supports this collaborative approach, as it best ensures technological neutrality and most nearly accommodates the dual regulation system mandated by Congress in all telecommunications legislation to date. A state, such as California, should be allowed to continue to be innovative in developing and modifying compensation arrangements that best serve the consumers in its jurisdiction.

Respectfully submitted,

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March 22, 1996

CERTIFICATE OF SERVICE

I, Mary Mack Adu, hereby certify that on this 22nd day of March, 1996, a true and correct copy of the forgoing **REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING** was mailed first class, postage prepaid to all known parties of record.

Mary Mack Adu

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